No. 95-2024

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

C. MARTIN LAWYER, III,
Appellant,

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Florida

BRIEF OF SENATOR HARGRETT AND PRIVATE APPELLEES

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QUESTIONS PRESENTED

1. Can the appellant properly raise in this appeal his federalism claim when he admits that he did not raise it in the lower court and when he does not have standing to raise it on appeal even if he had done so in the lower court?

2. Even if the claim is properly raised in this appeal, did the District Court violate the principles of federalism by approving a redistricting plan that both houses of the Florida Legislature — in an effort to comply with *Miller v. Johnson*, 115 S.Ct. 2475 (1995) — proposed in their capacity as litigants in this case, particularly where state officials chose not to call the legislature into session to address the matter and where the District Court did not preclude the legislature from adopting any other plan it chooses in formal session in the future?

3. Where the supporters of the remedial redistricting plan — including all parties in this case except the appellant — presented extensive evidence that the proposed configuration was primarily the result of traditional districting factors that were not subordinated to race, and where the appellant introduced no evidence despite having an ample opportunity to do so, did the District Court commit clear error in finding that the plan is constitutional?

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BRIEF OF SENATOR HARGRETT AND PRIVATE APPELLEES

This brief is filed on behalf of appellees Senator James T. Hargrett, Jr., Moease Smith, *et al.*, and Robert Scott, *et al.*

STATEMENT OF THE CASE

Summary of the Proceedings

This action was filed on April 14, 1994, by a number of plaintiffs, including appellees Robert Scott, et al. and appellant C. Martin Lawyer, III, challenging District 21 of the districting plan for the Senate of the State of Florida. According to the allegations of the complaint, District 21 was the result of an "attempt to segregate the races for purposes of voting" that rendered the plan unconstitutional. Complaint ¶ 13, at Joint

Appendix 13. The named defendants were the State of Florida and the United States Department of Justice. During the course of the proceedings, intervention was granted to the Florida Senate, the Florida House of Representatives, the Florida Secretary of State, District 21 Senator James T. Hargrett, Jr., and a number of black and Hispanic citizens, including residents of District 21, Moease Smith, et al.

In the midst of the litigation, this Court issued its decision in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), after which state officials considered their options in light of *Miller*. The Florida Legislature was not in session at the time and state officials chose not to call a special session. Given the import of *Miller*, they also chose not to plunge headlong into a costly and difficult liability defense regarding the pre-existing plan, but instead agreed — along with all of the other litigants — to attempt to negotiate a resolution of the case. These efforts resulted in a redistricting proposal drafted by state officials that included a markedly redrawn District 21 with a 36.2% black voting age population (VAP), down from its prior 45.0% black VAP. Among other things, the new plan reduced the number of counties touched by District 21 from four to three by eliminating a portion of Polk County from the district and by reconfiguring in part the portions of Hillsborough and Pinellas Counties that were in the district. That proposal was supported by all of the parties — including the original plaintiffs who challenged the pre-existing plan, the State of Florida, the Florida Senate, the Florida House of Representatives, the Florida Secretary of State, Senator Hargrett, the United States Department of Justice, and the citizens who had intervened in defense of the original plan — except one, plaintiff C. Martin Lawyer, III, who is the sole appellant here. At the same time the proposal was submitted, all of the litigants stipulated to the Court that a prima facie case of unconstitutionality existed

regarding the pre-existing plan. After the remedial plan was drafted and proposed to the Court by state officials, the Florida Attorney General submitted it to the United States Attorney General for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and preclearance was granted shortly thereafter. J.A. 25-26, 39-41, 158, 197-198, 201 n.3.

With State Senate elections scheduled in 1996, the three-judge District Court moved expeditiously. An evidentiary hearing was held on November 20, 1995, after widespread public notice about the proposal and the hearing. At the hearing, all parties, as well as all members of the public, were invited to submit comments, evidence, and objections. No one objected to the displacement of the pre-existing plan or to the stipulation that a prima facie case of unconstitutionality had been made with respect to it. The sponsors of the proposed remedy presented extensive evidence regarding the non-racial factors that shaped the new plan. The only party who objected to that plan was Mr. Lawyer, who is an attorney and who chose to represent himself in objecting to the proposed plan. However, he presented no evidence beyond the plan's statistics and no witnesses to support his objection, and declined when offered the opportunity to cross-examine the person who drafted the proposed plan. Only one other person — a member of the public who is not a party — expressed any concerns about the remedial proposal. J.A. 25-34, 171-172, 185-190, 205-206.

After taking the matter under advisement, the District Court entered an order adopting the proposed plan, holding that it was constitutional under the standard set out in *Miller v. Johnson*. Nothing in the Court's conduct of the case prevented the Florida legislature from going into formal session and adopting a different plan, and nothing in the Court's order prevents the legislature from doing so in the future.

Evidence Supporting The Remedial Proposal

At the November 20 evidentiary hearing, the position of the supporters of the remedial proposal was outlined by attorney Benjamin H. Hill, III, representing the Florida Senate. Mr. Hill reviewed the various factors that led to the configuration of this new plan and then placed into evidence, without objection and with the approval of the District Court, the relevant maps and statistics of the new plan, as well as various affidavits related to it. One of those was from John Guthrie, the Florida Senate's redistricting expert, who was the principal drafter of the proposed plan. Guthrie's affidavit and the attached tables and maps gave a detailed explanation of the reasons the proposal was drawn as it was. The District Court accepted Guthrie's affidavit as his direct testimony and offered all participants the opportunity to examine him further on the witness stand. J.A. 163-172.

Guthrie's affidavit made it clear that race was not the predominant factor in the drawing of the proposed plan, and that traditional redistricting factors had not been subordinated to race. More specifically, Guthrie demonstrated:

** The shape of District 21 and the surrounding districts in the new plan is not out of line with that of many of Florida's legislative districts. The end-to-end distance of the two most distant points in proposed District 21 is less than 50 miles, putting it 16th among Florida's 40 Senate districts in that particular measure of compactness. The Florida legislature has rejected, both formally and in practice, the use of compactness as a redistricting standard. Even so, bringing District 21 within the range of shapes normally utilized in the State was one of the goals underlying the drafting of the new plan. Guthrie decl. ¶¶ 4-6 & Tabs 9-12 at J.A. 25-27, 53-80.

** The plan was designed to comply with the one-person, one-vote principle of the Fourteenth Amendment, *id.* ¶ 8 at J.A. 28, and with the contiguity standard of the Florida Constitution, which the Florida Supreme Court has interpreted to be met even where districts span a body of water. *Id.* ¶ 9 at J.A. 28, *citing*, *In Re Constitutionality of Senate Joint Resolution 2G*, 597 So.2d 276, 279-280 (Fla. 1992). Several Florida Senate districts cross bodies of water. Guthrie decl. ¶ 9 at J.A. 28.

** One of the strongest reasons for drawing the proposal the way it was drawn was to comply with the traditional redistricting practice and important state interest of minimizing disruption and preserving the core of existing districts, while at the same time curing the constitutional violation that was the subject of the prima facie case that had been established. Florida's Senators are elected to four-year staggered terms. Odd-numbered districts, such as District 21, had elected Senators in 1992 and were scheduled to do so again in 1996. Even-numbered districts had last elected Senators in 1994 and were scheduled to do so again in 1998. A problem would have occurred if large numbers of people had been moved from an odd-numbered district, such as District 21, to an even-numbered district, thereby being unable for six years to vote for a Senator rather than going through the normal four-year cycle. If the plan were drawn in such a manner, special elections — and the disruption they entail — would have been required in the even-numbered districts as a means of preventing a widespread denial of the right to vote under state law. *See, In Re Apportionment Law*, 414 So.2d 1040, 1047-1050 (Fla. 1982). Most of the necessary adjustments could be made, and were made, by moving people from odd-numbered districts to other odd-numbered districts. Thus, some 235,875 people were moved from one district to another by the proposed plan, but only 3,225 of those were moved from an odd-numbered to an even-

numbered district. Guthrie decl. ¶¶ 10-12, 19 at J.A. 28-29, 32. In light of the de minimis nature of this latter number, special elections were not required under Florida law. *See*, J.A. 140, 142-143 (declaration of Michael Cochran, Chief Attorney in the Florida Secretary of State's Division of Elections).

** The plan specifically was designed so that any changes did not favor either Republicans or Democrats, and the overall balance between Republican and Democratic registration in the new districts remained roughly the same as in the old. Guthrie decl. ¶ 18 at J.A. 31.

** One of the factors affecting the drawing of the plan was the decision to maintain proposed District 21 as a district composed primarily of people who had common interests because of their low income, most of whom lived in urban areas. This group includes whites, blacks, and Hispanics, with whites being the predominant component. *Id.* ¶¶ 13-18 at J.A. 29-31.

** The Florida Legislature does not follow any principle of attempting to avoid the splitting of counties. Counties frequently are divided among two or more districts, sometimes where necessary to comply with the one-person, one-vote rule, but often for other reasons. For example, many Senators believe that having multiple representatives in the Senate provides counties with better representation. Only nine Senate districts are wholly contained within a single county, and five of those are in Dade County, where Miami is located. Under both the pre-existing plan and the proposed plan, 19 of Florida's 39 Senate districts are composed of portions of three or more counties. Proposed District 21's inclusion of parts of three counties — Hillsborough, Pinellas, and Manatee — is consistent with that and with redistricting combinations typically used in that area of the state. For example, Florida's House plan also

includes a district combining portions of Hillsborough, Pinellas, and Manatee Counties, and includes another two districts combining portions of Hillsborough and Pinellas. *Id.* ¶¶ 20-22 and Tab 4 at J.A. 32-33, 45-46.

** District 21 under the new plan would have a 36.2% black voting age population, and would be fair to all voters, with no group being excluded from meaningful participation in the political process. *Id.* ¶ 17, J.A. 31.

Appellant's Response To The Evidence Supporting The Remedial Proposal

In contrast to the detailed explanation presented by the proponents of the plan, appellant Lawyer submitted no affidavits, presented no evidence, and put on no witnesses at the November 20 hearing. Rather than respond to or challenge the evidence presented through Guthrie's declaration, Lawyer chose not to cross-examine Guthrie. Instead, he relied solely upon the exhibits already in the record, specifically those describing the proposed plan and showing that District 21 is 36.2% black in voting age population. Lawyer responded "yes" when asked by Judge Merryday: "So your litigation position is to equate the statistical composition with the prima facie showing of race-based districting?" J.A. 185. Chief Judge Tjoflat then invited Lawyer to present any evidence he had to support his claim:

> JUDGE TJOFLAT: You are free to put on any evidence that you have that race was the deciding factor in the fashioning of plan 386 as opposed to the totality of circumstances that Mr. Hill articulated in his presentation.

Id. Chief Judge Tjoflat added:

> JUDGE TJOFLAT: Mr. Hill has summarized, in effect, what is in the record. There are affidavits in the record. If you want to examine Mr. Guthrie, you're free to do so, or call any witness you want.

Id.

Lawyer then attempted to call as a witness Steven Mulroy, the attorney representing the United States Department of Justice. The Court held that the evidence was not relevant inasmuch as neither Mr. Mulroy nor the Department of Justice drew the plan, but instead the Attorney General had precleared the plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. J.A. 186-187.[1] Lawyer did not call or attempt to call any other witnesses.

Despite the widely published notice of the proposed plan and the hearing, only one other citizen chose to object, former District 21 State Senator Helen Gordon Davis, who is not a party to the case. Speaking through her attorney, she conceded that the configuration of proposed District 21 "does not look overly bizarre" and that there is "no evidence of discriminatory intent" on behalf of the state officials who drew the plan. However, she contended that because of the crossing of county lines, "an inference can be drawn that race . . . is the overriding consideration." Under questioning from the Court, she agreed that the crossing of county lines occurs with some frequency in Florida and that this fact takes away what Chief Judge Tjoflat called "one stick . . . in your circumstantial evidence" against the remedial proposal. J.A. 188-190. No evidence was presented on behalf of former Senator Davis.

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[1] Lawyer does not challenge the District Court's holding in this regard, or make any claim that there was anything unfair about the way the District Court conducted the evidentiary hearing itself.

The District Court's Decision

On March 19, 1996, the District Court issued its decision holding that the proposed remedy is constitutional. All three judges joined in that conclusion with respect to the new plan. Judge Merryday's opinion for the District Court described and quoted at length this Court's elucidation in *Miller* of the burden required of any person challenging the constitutionality of a redistricting plan on the ground that traditional redistricting principles were subordinated to race. J.A. 202-203, *quoting, Miller v. Johnson*, 115 S.Ct. at 2488. The District Court noted that the Constitution, as interpreted by the majority in *Miller*, forbids a districting plan that is "motivated and dominated" by race. J.A. 205.

Having quoted and discussed the *Miller* test, the District Court then evaluated both the pre-existing District 21 and the proposed remedy under that test. With respect to the pre-existing plan, the Court noted that it bears "some of the conspicuous signs of a racially conscious contrivance." J.A. 205. By contrast, considering the geographic configuration and demographic composition of the proposed remedy, and in light of traditional districting considerations, the Court held that the remedy is constitutional and that Martin Lawyer had not made out his case to the contrary under *Miller:*

> Therefore, the conclusion is obvious that the plaintiffs allege a cognizable, constitutional dispute concerning *present* District 21, which bears at least some of the conspicuous sig ıs of a racially conscious contrivance. On the other hand, it is equally obvious that a cognizable, constitutional objection to *proposed* District 21 is *not* established. In its shape and composition, proposed District 21 is, all said and done, demonstrably

> benign and satisfactorily tidy, especially given the prevailing geography.

J.A. 205 (emphasis added).

The District Court noted in its opinion that the pre-existing District 21 had uneven boundaries, but that they were not without precedent and were not the most extraordinary Senate district boundaries in Florida. J.A. 202. In the course of evaluating the new proposed district under *Miller*, the Court pointed out that its boundaries were even less strained and much more regular than the district in the pre-existing plan. J.A. 207. Taking into account the shape of proposed District 21 — which is within the mainstream of Florida's legislative districts — as well as the racial composition of the districts in the new plan and the geographic realities of the area, the Court reiterated its conclusion regarding the constitutionality of the proposal. In so doing, the Court noted that the district had *not* been drawn based on racial or stereotypical assumptions, and had not been drawn to give one racial group control of the district over another:

> An observant and informed analyst of Plan 386 [the proposed plan] is not startled or impelled toward incredulity by the proposed district's configuration or composition. . . . [I]mportantly, Plan 386 offers to any candidate, *without regard to race*, the opportunity to seek elective office and both a fair chance to win and the usual risk of defeat — neither of which is properly coerced or precluded by the state, the court, or the Constitution. Candidates should compete and either win or lose based on their talent, their good fortune, and their views. Nothing about Plan 386 is determinative of an electoral outcome — because of race or otherwise.

J.A. 207 (emphasis added). The District Court concluded by reaffirming its "constitutional approval" based upon "applicable precedent," and said: "Plan 386 passes any pertinent test of constitutionality and fairness." *Id.*

Chief Judge Tjoflat wrote a special concurrence in which he joined the unanimous conclusion that the proposed remedy is constitutional. J.A. 208-209. He differed with the majority only in his belief that the Court should find liability with respect to the pre-existing plan as a prerequisite to adopting the proposed remedy. He said that liability could be found based on the existing record and, therefore, that no impediment existed to adoption of the proposed plan. *Id.* By contrast, the majority held that an adjudication of liability was not necessary, but instead that the existence of a prima facie case of unconstitutionality was sufficient to trigger the Court's authority to adopt the proposed remedy, particularly given that no one had objected to the displacement of the pre-existing plan. J.A. 199-203.

It is from the Court's March 19 decision that Martin Lawyer takes his appeal.

SUMMARY OF ARGUMENT

Appellant Lawyer first contends the District Court violated principles of federalism (1) by failing to fully adjudicate the liability of the pre-existing plan and (2) by adopting an interim remedial plan proposed by state officials rather than awaiting some unspecified action by Florida's Legislature in formal session or by Florida's Supreme Court. However, as Lawyer admitted in his jurisdictional statement but failed to mention in his brief on the merits, "[t]his issue was not raised below." J.S. 19. Even if it had been raised, Lawyer has no standing to complain of a failure to fully adjudicate liability before displac-

ing the prior plan. All along, he has sought to displace that plan. The fact that the displacement occurred without a finding of liability is of no legal consequence to Lawyer. Standing would exist only for someone for whom that action would have some legal consequence — such as a party or intervenor who opposed displacement of the prior plan.

Even if Lawyer had preserved the federalism claim and had standing to raise it, there is no reversible error. The District Court was properly respectful of the prerogatives of the State of Florida and its governmental branches. The state officials who were parties to this case made it clear that they were not calling the Florida Legislature into session to address redistricting, and they did not ask the District Court to await some future session of the Legislature. Instead, these parties — including the Florida Senate and House — proposed a remedial plan in their capacities as litigants in this case in the wake of *Miller v. Johnson*. With the 1996 elections approaching and recognizing that no legislative action was imminent, the District Court acted properly in reviewing the plan proposed by state officials in the context of the litigation. In no way did the District Court interfere with the prerogatives of the Legislature or preclude it from adopting, at any time during the litigation or in the future, any redistricting plan it chooses.

At no point during the lengthy District Court proceedings did Lawyer contend, as he does now, that even if the legislature was not going to act in session, the District Court should await some unspecified action by the Florida Supreme Court. Article 3, § 16 of the Florida Constitution, upon which Lawyer now relies, applies by its terms only to "the second year following each decennial census." No one, including Lawyer, ever asked the Florida Supreme Court to confront the situation faced by the

District Court, and the Florida Supreme Court never addressed the matter itself.

Any purported error from the failure to adjudicate liability is not reversible inasmuch as it makes no difference to the outcome. This is clear from the fact that Chief Judge Tjoflat, who concluded (as Lawyer advocated) that liability should be found on the existing record, nevertheless concurred in the judgment and reached the same ultimate result as the majority, holding that the prior plan should be displaced and the proposed remedy adopted in its stead. Moreover, Lawyer has not demonstrated that any error — reversible or otherwise — grew out of the failure to fully adjudicate liability. The District Court found that the state officials who are parties to the case "manifested . . . the authority" under state law to draw the new plan and agree to the judgment. J.A. 197. The remedy was proposed by the very entities of Florida government with primary responsibility for redistricting under state law, the Florida Senate and House. Based on the evidence and stipulations in the record, the District Court found that a prima facie constitutional violation had been established with respect to the prior plan. Under the unique circumstances of this case, the District Court did not abuse its discretion or commit error in failing to fully adjudicate liability.

Lawyer also contends that the new plan is unconstitutional, but the District Court disagreed. The District Court's finding in this regard should not be reversed unless clearly erroneous. At the hearing to consider the constitutionality of the plan, Lawyer failed to put on any evidence or cross-examine the Florida Senate's redistricting expert, John Guthrie, who played a key role in drafting the plan. Guthrie's report, introduced in affidavit form and accepted by the District Court as his direct testimony, elucidated the myriad non-racial districting factors

that led to the configurations of the new plan. Lawyer has presented nothing to contradict that or to call into question the District Court's finding that racial predominance did not taint the remedial plan.

ARGUMENT

I. THE FEDERALISM CLAIM HAS NOT BEEN PROPERLY PRESERVED AND THE APPELLANT HAS NO STANDING TO RAISE IT.

According to Lawyer, the District Court violated the principles of separation of powers and federalism by failing to declare the then-existing plan (Plan 330) unconstitutional and by adopting an interim remedial plan in the absence of action by the Florida Legislature in formal session or by the Florida Supreme Court.

Of course, this is not an issue about "separation of powers," even though Lawyer uses that terminology. Separation of powers refers to co-equal branches within the same national government or within the same state government, but it does not apply to relations between a branch of the federal government and a branch of a state government. That, instead, falls under the heading of federalism.

A. The Appellant Has Waived This Claim By Failing To Present It To The Trial Court.

He fails to mention it in his brief on the merits, but Lawyer correctly admitted in his jurisdictional statement that "[t]his issue was not raised below." J.S. 19. Accordingly, it is not properly before this Court. *See, Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

The only explanation Lawyer provided was the following: "This issue was not raised below because Appellant Lawyer

was represented by counsel who embraced the idea of a mediated 'settlement.'" J.S. 19. This is not a good excuse. Lawyer noted elsewhere in his jurisdictional statement that he is an attorney himself, and that he began representing himself prior to the presentation of any of the remedial proposals to the Court. J.S. 3-4. As he details in the jurisdictional statement, he filed his own objections to the proposed remedial plan. J.S. 4-5. He certainly could have raised the federalism objection at that time and it is disingenuous for Lawyer now to blame his former counsel for Lawyer's own failure to do so.[2]

B. Even If The Appellant Had Preserved The Issue, He Does Not Have Standing To Raise It.

Even if he had raised the issue in the District Court, Lawyer does not have standing here to complain about the absence of a finding of unconstitutionality. From the beginning of this case, Lawyer sought to displace and abolish the pre-existing redistricting plan. The fact that the displacement occurred through the majority's approach, based upon the stipulation of a prima facie case, rather than through a declaration of unconstitutionality, as advocated by the concurrence and by Lawyer, is of no

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[2] Even if, despite his admission that he did not raise it, Lawyer somehow could be said to have preserved the federalism claim that an adjudication of liability should have been made, he never took the position that federalism required the District Court to await action by the Legislature in session or by the Florida Supreme Court under these circumstances. While he said awaiting action by the Legislature in session was *one option*, he never contended, as he now does in this Court, that the District Court was required to follow that course. See R. 180 at 15-16 (transcript of hearing of November 2, 1996, in which Lawyer said that "perhaps" the District Court should "defer to the State of Florida in some . . . fashion," but "that would be for the court to decide"). Furthermore, Lawyer never claimed that the matter should be deferred for the Florida Supreme Court to address it.

legal consequence to Lawyer. It might be of consequence to someone who supported the pre-existing plan and who contends it should remain in effect in light of the fact that there has been no declaration of unconstitutionality or action taken in a formal legislative session. However, no party to this case, and no member of the public, took that position at any time during the District Court proceedings, including the November 20 public hearing, and none have taken that position in an appeal to this Court.

Parties to a case in a trial court do not always have standing to raise particular issues on appeal. *See, Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). Whether as a plaintiff in the trial court or an appellant on appeal, a party "must allege a distinct and palpable injury *to himself*." *Warth v. Seldin*, 422 U.S. 490, 501 (1973) (emphasis added). *See also, Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Thus, in *Diamond v. Charles*, 476 U.S. 54 (1986), this Court held that an intervenor did not have standing to seek review in this Court of a lower court decision declaring an Illinois abortion statute unconstitutional where the State itself chose not to seek review. As this Court stated, "the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.'" *Id.* at 62, *quoting, Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). Here, there is no injury to Lawyer stemming from the District Court's decision on the liability issue, and he has no direct stake in the outcome.

II. EVEN IF THE FEDERALISM CLAIM HAD BEEN PRESERVED AND EVEN IF THE APPELLANT HAD STANDING TO RAISE IT, THE DISTRICT COURT WAS PROPERLY RESPECTFUL OF THE PREROGATIVES OF THE FLORIDA LEGISLATURE AND DID NOT VIOLATE THE PRINCIPLES OF FEDERALISM.

When a federal court invalidates a districting plan, it must defer to the legislature and allow the legislature "a reasonable opportunity" to design a remedy. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). But in so doing, the federal court cannot order the legislature into formal session. It can only give state officials the opportunity to convene the legislature and address redistricting in formal session if they desire.

Here, state officials had every opportunity to convene the legislature. They examined their options after this Court's 1995 decision in *Miller*, and chose not to call a special session.[3] Similarly, they did not ask the Court to allow them the opportunity to draw a plan upon convening in regular session. Instead, they proposed a remedial plan in their capacity as litigants in this case. With the 1996 elections approaching, the District Court acted properly in recognizing that no legislative action was imminent and in reviewing the plan proposed by state

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[3] Under Florida law, a special session can be called by joint resolution of the Speaker of the House and the President of the Senate. Fla. Stat. § 11.011(1). It also can be called by a vote of three-fifths of the members of each house, with the vote initiated by petition from twenty percent of the members of the legislature. Fla. Stat. § 11.011(2). In addition, it can be called by the Governor. Fla. Const. Art. 3, § 3(c).

officials in the context of the litigation.[4] None of the District Court's actions infringed upon the legislature's prerogatives or precluded the legislature from later exercising whatever power it has to adopt some other redistricting plan.

Thus, contrary to Lawyer's contention, this was not some sort of creation of legislation by the federal judiciary. The plan was not drawn by the District Court, but by state officials — including the Florida House and Senate in their capacity as parties in the case — who were joined by all other parties save Lawyer in recommending the plan to the Court.[5]

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[4] Qualifying for the 1996 State Senate elections occurred in July of 1996. Fla. Stat. §§ 99.061(1), 100.031, 100.061. The legislature was not scheduled to meet in regular session until March of 1996. Fla. Const., Article 3, § 3(b). Had the legislature chosen to adopt a new plan in formal session, time was needed to obtain Section 5 preclearance and to provide voters and potential candidates with adequate notice of the districting lines. Had state officials believed the regular session would produce a plan in time for the 1996 elections, they could have asked the District Court to await the session. But they did not do so.

[5] Lawyer asserts that the mediation consisted of "closed-door caucuses," and he cites the local rule requiring confidentiality in mediation. Brief for Appellant at 7, 33-34. Those caucuses, he says, "precluded the creation of evidence of legislative intent." *Id.* at 34. However, in this instance, the local rule was waived and the mediation sessions generally were open to the press and the public in light of the importance of the issue, J.A. 205, and Mr. Lawyer, as a party, had full access to the sessions — although he often did not attend. On occasion, the mediator would meet with one party out of the presence of others as a means for determining if differences could be bridged. But otherwise, the process was very public. Thus, nothing prevented Lawyer from obtaining evidence of the motivation of those drafting the plan. Moreover, the District Court offered Mr. Lawyer the opportunity to call witnesses and to cross-examine the principal drafter of the plan, yet he declined to do so. He is hardly in a position to complain about being denied evidence of the motivation of those who drew the plan.

Both Lawyer and the amicus supporting him contend that the District Court's action not only disregarded the province of the legislature, but also that of the Florida Supreme Court under Article 3, § 16 of the Florida Constitution. Once again, however, Lawyer raises a point here that he failed to mention in the District Court. At no time did he or anyone else suggest to the District Court that, even in the absence of the legislature being called into session by state officials, the matter should be deferred to await some action by the Florida Supreme Court consistent with Lawyer's present reading of Article 3, § 16. At no time did he or anyone else file an action in the Florida Supreme Court or in any other state court asking for a state law interpretation of Article 3, § 16, or asking the Florida Supreme Court to act. Indeed, he told the District Court that while it might be permissible, it certainly was not necessary to afford *any* state actor an opportunity to redistrict:

> I would submit that it would be — well, that the court would — may very well, as Judge Tjoflat seemed to indicate, defer to the State of Florida in some . . . fashion, *perhaps* this would be appropriate, *but that would be for the court to decide*. And it would be presumptuous of me, certainly, speaking for myself, to make any suggestion to the court that there is one preferable way or one exclusive way to deal with the remedial plans.

R. 180 at 15-16 (Hearing of November 2, 1996) (emphasis added). And at no time did the Florida Supreme Court ever indicate that it intended to take any action regarding the post-*Miller v. Johnson* scenario that confronted the District Court.

Had Lawyer raised the point, the District Court could have reviewed the claim and determined if Article 3, § 16 required the Florida Supreme Court to draw a redistricting plan rather

than permitting state officials to propose a plan in their role as defendants in the federal proceeding. Certainly, none of the state officials in this case — who are themselves charged with upholding the Florida Constitution — believed Article 3, § 16 required them to present the matter first to the State Supreme Court before proposing a resolution to the District Court in this case. Otherwise, they would have done so. Moreover, the language of Article 3, § 16 demonstrates that it does not apply here:

> (a) *Senatorial and representative districts.* The legislature *at its regular session in the second year following each decennial census*, by joint resolution, shall apportion the state . . . into not less than thirty nor more than forty consecutively numbered senatorial districts . . . and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts. . . . Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session . . . , and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment.
>
> (b) *Failure of legislature to apportion; judicial reapportionment. In the event a special apportionment session of the legislature* finally adjourns without adopting a joint resolution of apportionment, *the attorney general shall*, within five days, *petition the supreme court of the state to make such apportionment.* No later than the sixtieth day after the filing of such petition, the supreme court shall file with the secretary of state an order making such apportionment.

> (c) *Judicial review of apportionment.* Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgement.

(Emphasis added).

Several things indicate the inapplicability of this provision to the present situation. By its own terms it applies only in "the second year following each decennial census." Further, the power of the Florida Supreme Court to draw its own plan is triggered only by a petition from the State Attorney General, which is triggered only if "a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment." Where, as here, no special session was called, Article 3, § 16(b) is inapplicable and the Florida Supreme Court would seem to have no power to initiate its own redistricting plan.[6]

Certainly, the unfolding of events in this case was unusual, but this is because Florida officials exercised their prerogative not to convene the legislature and address redistricting in formal session. And while that is unusual, it certainly is not the first time in a legislative redistricting case that constitutional

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[6] The Florida Supreme Court could only become involved upon a petition from Florida's Attorney General under Article 3, § 16. The Attorney General represents the State in this case and obviously has *not* taken the position that Article 3, § 16 requires the presentation of this matter to the Florida Supreme Court.

problems have existed and a legislature has chosen not to address them in formal session because of the impracticality of convening or for other reasons. In such situations, a district court should have the flexibility and discretion to receive the input of state officials and the legislative bodies themselves, in their capacities as litigants, and to consider state policies as reflected by the proposals of those officials and legislative bodies. In the present case, the District Court carefully weighed all concerns and properly exercised its discretion. But the sort of procedural straitjacket that Lawyer seeks to impose here will impair the ability of district courts in the future to confront the wide variety of scenarios that arise from time to time in redistricting litigation.

With respect to a slightly different point, the District Court here considered the remedial proposal of Florida's officials to be a legislative plan. J.A. 206. In other circumstances, there might be an issue of whether such a plan — designed and proposed by state officials, but adopted outside of a formal legislative session — should be treated as a "legislative" or "court-ordered" plan. *Wise v. Lipscomb*, 437 U.S. at 544, suggests that it should be considered a legislative plan, as does *McDaniel v. Sanchez*, 452 U.S. 130 (1981). However, that question need not be resolved in this appeal since it has not been raised by Lawyer and is of no consequence in this case. The question does not matter for purposes of whether preclearance under Section 5 is necessary, *see, McDaniel v. Sanchez*, since preclearance was obtained anyway. It does not matter in terms of whether the remedial standards for court-ordered plans are appropriate, *see, Connor v. Finch*, 431 U.S. 407, 414 (1977), since the new remedy lives up to those standards inasmuch as it utilizes single-member districts, has a low overall population deviation of 1.6%, and does not dilute minority voting strength. *See, id.* at 414, 422-426 and n. 21.

While the District Court here exhibited deference to the proposal as if it were a legislative plan, J.A. 206, that sort of deference to state policies is also required in a court-ordered plan. *Upham v. Seamon*, 456 U.S. 37, 41-43 (1982); *White v. Weiser*, 412 U.S. 783, 794-795 (1982). Indeed, the proposed remedy does what this Court has required in *Upham* and *Weiser* with respect to court-ordered plans: it has altered the pre-existing plan only as much as is necessary to cure any violation, but has left the remainder of the plan in place with a minimum of disruption.

As explained in Section I-B above, the question of whether an adjudication of liability was necessary before state officials could propose a redrawing of the districts is *not an issue in this appeal* inasmuch as Lawyer does not have standing to raise it.[7] Moreover, if there is error, it does not impact the outcome here. This is apparent from the concurrence of Chief Judge Tjoflat, who contended that the prior plan was unconstitutional, yet properly concluded — in the absence of the convening of the legislature in formal session — that the Court should adopt in its place the plan proposed by state officials in their capacity as litigants. J.A. 208-209. Thus, whether the majority's approach or that of Chief Judge Tjoflat is correct, the outcome is the same. Any error that occurred is not an error that should lead to reversal of the District Court's judgment.

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[7] In addition, Lawyer's claim about the failure to adjudicate liability is not fairly included in the "questions presented" page of his jurisdictional statement. His second question presented focuses only on the use of mediation to draw the new redistricting plan, and does not mention the failure to adjudicate liability as a prerequisite for displacing the prior plan. *See*, Rule 18 of the Rules of this Court, which incorporates Rule 14, including Rule 14.1(a), which reads: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court."

Moreover, Lawyer has not demonstrated that any error did in fact occur. Unlike the cases Lawyer cites, Brief for Appellant at 26-29 — where, for example, "the record demonstrated" no "sufficiently identified illegality," *LULAC v. Clements*, 999 F.2d 831, 847 (5th Cir. 1993) (en banc), *cert. denied*, 114 S.Ct. 878 (1994), where a state attorney general attempted "to forge a settlement agreement over the express objection of his client" and attempted to "ignore his clients and bind the State against their wishes," *id.* at 842-843, where the proposed settlement "violate[d] the Voting Rights Act," *White v. Alabama*, 74 F.3d 1058, 1071 n.3 (11th Cir. 1996), or where officials from the local level agreed to a remedy that contravened statutes of statewide import, *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir. 1995) — the appropriate prerequisites for the District Court's adjudication in the present case were clearly satisfied. The District Court found that the state officials who are parties to the case "manifested . . . the authority" under state law to confect the remedy and agree to the judgment. J.A. 197. There was no disagreement or conflict among those state officials about the remedy or any of its details. The remedy was agreed to, and indeed proposed by, the Florida Senate and the Florida House, which are the very entities of state government with primary responsibility for redistricting under Florida law. After considering the extensive evidence in the record, the District Court specifically found that a prima facie case of a constitutional violation had been established regarding the pre-existing plan. It also found, again based on extensive evidence, that the remedy is constitutional and complies with federal law.

Thus, this is a situation where the responsible state officials — finding themselves in the midst of a lawsuit and facing a prima facie showing of unconstitutionality in an area of the law that has rapidly changed over recent years — have sought to terminate the litigation and resolve the constitutional objections

through negotiation. That negotiation produced a remedy agreed upon by all of the relevant state actors in their capacity as litigants. In the circumstances of this case, the District Court did not commit reversible error by adopting the proposed remedy on the basis of the prima facie constitutional showing that was established in the record.

III. THE APPELLANT HAS NOT DEMONSTRATED THAT THE DISTRICT COURT'S FINDING OF CONSTITUTIONALITY REGARDING THE PROPOSED REMEDY IS IN ERROR, MUCH LESS THAT IT IS CLEARLY ERRONEOUS.

It was Lawyer's burden to prove in the District Court that the plan is unconstitutional. Not only did he fail to carry the burden, he failed even to go forward with proof. When the supporters of the plan introduced evidence from John Guthrie detailing the myriad factors that led to the plan, Lawyer did nothing to meet or contradict that evidence, and he specifically declined the District Court's invitation to examine Guthrie.

The District Court's determination of constitutionality cannot be reversed unless clearly erroneous. *See, Rogers v. Lodge*, 458 U.S. 613, 622-627 (1982). *See also, Miller v. Johnson*, 115 S.Ct. at 2488 ("the District Court . . . finding . . . was not clearly erroneous"). In voting rights cases, this Court often has emphasized that district courts are more familiar with the relevant locality — including traditional districting principles utilized in the jurisdiction and related geographic factors — than is this Court. As noted in *White v. Regester*, 412 U.S. 755, 769-770 (1973):

> [W]e are not inclined to overturn [the district court's] findings, representing as they do a blend of history and [a] local appraisal of the design and impact of the . . .

district in the light of past and present reality, political and otherwise.

See also, Clark v. Roemer, 500 U.S. 646, 659 (1991) (local districts courts in voting cases are more familiar than this Court "with the nuances of the local situation").

Since *Shaw v. Reno*, 509 U.S. 630 (1992), this Court's holdings that specific redistricting plans are subject to strict scrutiny have come only in cases where the district courts first made particularized findings, based on the evidence, that race was the predominant factor in disregard of traditional districting criteria. *See, Miller v. Johnson*, 115 S.Ct. at 2488-2490; *Shaw v. Hunt*, 116 S.Ct. 1894, 1901 (1996); *Bush v. Vera*, 116 S.Ct. 1941, 1951-1952 (1996). By contrast, where a district court has examined the evidence in light of the proper evidentiary standard and has held that race did not predominate in disregard of traditional factors, this Court has affirmed and has not imposed strict scrutiny. *See, Dewitt v. Wilson*, 856 F.Supp. 1409, 1413 (E.D. Cal. 1994), summarily aff'd, 115 S.Ct. 2637 (1995). Moreover, neither this Court nor any other court of which we are aware has ever held that race was the predominant factor in creating a district where the VAP of the relevant minority group is as low as 36.2%. Given the complexity of drawing redistricting plans and the deference properly accorded state officials in that process, *see, Miller*, 115 S.Ct. at 2488, it should be the extremely rare case in which a district court is overturned after concluding, in a situation like this, that the *Miller* standard has not been met by a plaintiff challenging a redistricting plan.

In the trial court, Lawyer rested his case primarily on the numbers in District 21, specifically agreeing with Judge Merryday's observation at the November 20 hearing that Lawyer's position was "to equate the statistical composition [of

the district] with the prima facie showing of race-based districting." J.A. 185. District 21 is 36.2% black in voting age population. In this Court, Lawyer claims that the districting of Senate District 21 "was not race-neutral, and that the driving force behind [the district's] creation was to effectuate the perceived common interests of one racial group — African-Americans." Brief for Appellant at 35.

Lawyer contends here that this claim is supported by the shape of the district, *id.* at 40-41 the fact that it goes beyond Hillsborough County, *id.* at 41-42, the district's alleged non-contiguity, *id.* at 43, the alleged lack of compactness resulting from going outside of Hillsborough County, *id* at 43-44, and what Lawyer calls "a black-maximization policy which assumed that black voters in [the three] counties had a communit[y] of interest." *Id.* at 45.

However, as noted above in the Statement of the Case, the District Court examined all of these things — the statistical composition of the district, the shape, the compactness, the geography (including the presence of Tampa Bay), and the multi-county composition — under the *Miller* standard, and disagreed with Lawyer. In terms of composition, shape, and compactness, the District Court found that the district is "demonstrably benign and satisfactorily tidy, especially given the prevailing geography." J.A. 205. *See also* J.A. 202, 207. The Court noted that the crossing of county boundaries and water in Florida, and particularly in the Tampa Bay area, is a fact of redistricting life. J.A. 203-204. The Court held that this 36.2% black district is not indicative of what Lawyer calls "a black-maximization policy," but instead "offers to any candidate, *without regard to race*, the opportunity to seek elective office, and both a fair chance to win and the usual risk of

defeat." J.A. 207 (emphasis added).[8] Particularly in light of his failure to present evidence, Lawyer cannot demonstrate on appeal that the District Court's finding of constitutionality was error, much less clear error.

Indeed, there is substantial evidence supporting the District Court's finding. As indicated by Appendix F to Lawyer's jurisdictional statement and by the Guthrie affidavit, the district is composed of areas primarily adjacent to or just on either side of Tampa Bay — designed to create a low-income urban district populated mostly by citizens of Tampa and St. Petersburg who live near the cross-bay downtown areas of those cities.[9] The

[8] It is of some relevance that all of the diverse parties — except Lawyer — have agreed to the remedial plan. These parties include not only those who defended the pre-existing plan, but also those plaintiffs (other than Lawyer) who challenged it, claiming that it was an "attempt to segregate the races for purposes of voting." Compl. ¶ 13 at J.A. 13. In contrast to their views about the pre-existing plan, these plaintiffs do not believe that the remedy is an attempt to segregate or classify by race.

[9] The remedy contains the same Manatee County configuration in the southern part of the district that was present in the pre-existing plan. The reason for this is clear from looking at the maps in the appendix to the jurisdictional statement. J.S. App. 29a-30a. If the Manatee County portion of District 21 were deleted, it would have to be absorbed by the surrounding District 26, which is an even-numbered district not scheduled for elections until 1998. A special election would be required under Florida law so those who were in District 21 would not have to wait two more years before exercising their right to vote. See the Statement of the Case in this brief. Moreover, the ripple effect could well cause other special elections in other even-numbered districts. In addition, a precipitous change like that could affect the delicate partisan balance between Republicans and Democrats. Thus, the need for stability and continuity — while still correcting the alleged violation — justified maintaining Manatee County as it was in the pre-existing plan. This is not improper. Moreover, even if race were the predominant motive of the configuration of the pre-existing District 21, the

fact that the district has a 36.2% black voting age population rather than some different percentage does not mean — as Lawyer contends — that the predominant motivation was to "effectuate the perceived common interests of . . . African-Americans." Brief for Appellant at 35.

Lawyer seems to be claiming that the black percentage in the overall district cannot exceed the black percentage in any of the counties from which portions of the district come. *Id.* at 42. However, communities in counties are not grouped so that each reflects the identical racial composition of the county at large. Any suggestion by Lawyer that a district's black percentage cannot exceed that in any of the overall constituent counties would institutionalize a sort of racial proportionality that cuts against the grain of *Miller, Shaw v. Hunt*, and *Bush v. Vera*.

Lawyer contends that he has proven the predominance of race from the fact that the district goes outside of Hillsborough County and crosses Tampa Bay to do so, thereby destroying its

modifications made in the remedial plan by eliminating the Polk County portion of the district and changing the Hillsborough and Pinellas County compositions have, as an overall matter, turned race into only one of a number of factors that led to the new district. And even if race was a factor in the Manatee County composition of the pre-existing district, the retention of that portion of the district for a variety of motives, including non-racial ones, does not doom the plan to unconstitutionality, particularly where the Manatee County portion accounts for less than 10% of the district's population. Lawyer does not carry his burden here simply by showing that race was the reason for including some of the residents in the district. Instead, he must demonstrate "that race was the predominant factor motivating the . . . decision to place a *significant* number of voters within or without [the] district." *Miller v. Johnson*, 115 S.Ct. at 2488 (emphasis added). Here, as the District Court found, race was not the predominant factor in determining the overall composition of the remedial plan and race was not employed in disregard of traditional districting principles.

contiguity according to him. Brief for Appellant at 43. Of course, with 40 senate districts and 67 counties, it is impossible to keep all districts within a single county. Florida does not require districts within a single county, and traditional practices favor multi-county districts. As Guthrie testified, only 9 of the state's 40 senate districts are located within a single county, and 5 of those come from Dade County. Guthrie decl., ¶¶ 20-22 at J.A. 32-33. And while Lawyer asserts that the crossing of a body of water makes District 21 noncontiguous, Florida law is to the contrary. The Florida Supreme Court has said:

> We hold . . . that the presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district, does not violate this Court's standard for determining contiguity under the Florida Constitution.

In Re Constitutionality of SJR 2G, 597 So.2d 276, 280 (Fla. 1992).

As for Lawyer's claims about shape and compactness, Guthrie's affidavit demonstrates that District 21 is within Florida's tradition and practice in terms of these factors, and Lawyer has presented nothing to contradict that.

In light of all of this, the District Court was on firm ground when it examined the evidence under the *Miller* standard and found the proposed remedy to be constitutional. Lawyer wants this Court to micromanage Florida's Senate redistricting by undertaking a de novo review of the very task that is properly entrusted to the District Court. He is hardly in a position to do that, particularly given that he did not present any evidence or question any witnesses regarding his claim that this plan was the result of a predominant racial motivation. The District

Court properly disposed of this issue in the present case and Lawyer has done nothing to demonstrate that the District Court's action was error, much less clear error.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the District court should be affirmed.

Respectfully submitted,

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